IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 359 OF 2005
IN
SECOND APPEAL NO. 169 OF 2005

Commissioner, Pimpri Chinchwad
Municipal corporation, Pimpri, Pune. ... Applicant.
Versus.
Pir Hazrat Jalaluddin Shah Kadri
Rahal Alai Trust (Gaibi Peer) Dargah. ...Respondents.

Shri N.V.Walawalkar with Shri A.J.Suryawanshi for the Applicant.

Shri Rajesh P.Behere for the Respondent No.2.

CORAM : ABHAY S. OKA, J.

DATED : 7th April, 2005.

P.C.:

1. Rule. Shri Behere waives service for the Respondent No.2. Taken up for hearing forthwith.

2. By the impugned Judgment and decree, the Applicant has been restrained from obstructing or disturbing the peaceful use and enjoyment of the Respondents of the property described in paragraph 1 of the plaint otherwise than by due process of law.

3. In the Civil Application it is contended that there was no interim injunction in favour of the Applicant/Plaintiff during the pendency of the suit and the Appeal in the First Appellate Court. A contention is raised that on a portion of the suit land, the

Applicant/Appellant has started construction of an out-patient department attached to the Hospital of the Applicant/Appellant. It is stated that the work was started initially in the year 2003. It is stated that on 31st March 2004 the work of construction of the slab of the ceiling of the ground floor was commenced and completed. It is stated that on 13th May 2004 the work of slab of the first floor was commenced along with the brick work of the ground floor. It is further stated that as a result of the decree passed by the Appellate Court, the work of construction has been stopped. It is contended that a sum of Rs.20 lakhs has been spent on the said construction.

4. Shri Behere has invited my attention to the affidavit-in-reply filed by the Respondents-Plaintiffs. In the affidavit-in-reply it is not disputed that the construction of the OPD has been taken up by the Applicant. It is stated in paragraph 5 of the reply that the work of construction is totally illegal and unauthorised. It is stated that even the work of plastering is not done. It is stated that even going by the statement made in the Civil Application, the work was carried out even after the decree of perpetual injunction was passed by the Appellate Court. He, therefore, submitted that no case was made out for grant of any stay.

5. There is a clear finding of fact recorded by the Appellate Court as regards possession of the Respondents/Plaintiffs and that is the reason why decree for perpetual injunction for protecting the possession of the Respondent/Plaintiff has been passed.

6. The Applicant/Appellant has not brought to the notice of the Appellate Court that the construction of OPD was started on a part of the suit property. But the fact that the RCC construction of ground plus one floor has come up on a small portion of the suit property is not disputed by the Plaintiffs/Respondents. It is also not disputed that the construction of out-patient department by the Applicant/Corporation is a part of the Hospital which is admittedly adjacent to the suit plot. The contention of the Respondents/Plaintiffs is that the construction went on after the decree was passed by the Appellate Court in gross breach of the said decree. I am not adjudicating upon the said contention. If there is any breach committed by the Applicant of the decree passed by the Court below, it is always open for the Respondents/Plaintiffs to adopt appropriate proceedings in that respect. However, the fact remains that the construction of the OPD section started by the Applicant/Appellant is for the public utility. Considering the findings recorded by the Appellate Court, I am not inclined to stay operation and execution of the decree. However, it will have to be clarified

that till final disposal of the Appeal, it will be open for the Applicant/Appellant to proceed with the construction of the OPD only above the ground floor which is already constructed. It is made clear that further construction of the OPD will be subject to the final result of the Second Appeal and will be at the risk of the Applicant/Appellant.

7. Hence the following order is passed:

(i) Prayer for stay of execution and operation of the impugned Judgment and decree is rejected.

(ii) Notwithstanding the rejection of the prayer for stay of execution and operation of the impugned Judgment and decree, it will be open for the Appellant to continue with the construction of the OPD section only above the existing ground floor which is referred to in the Civil Application. It is made clear that further construction of the OPD section will be at the risk of the Applicant/Appellant and subject to the final result of the Second Appeal. It will be open for the Applicant/Appellant to utilise the OPD

Section only for that specific purpose.

(iii) If the Appellant/Applicant has carried out construction in breach of the decree of perpetual injunction, the remedy of the Respondents/Plaintiffs to take out appropriate proceedings in that behalf is kept open. If such proceedings are taken out by the Respondent/Plaintiff, it will be dealt with by the Court in accordance with the law.

(iv) It is clarified that while completing the construction of the OPD Section, the Appellant/Applicant will not make any extension horizontally to the existing ground floor.

(v) Civil Application is disposed of in the above terms with no order as to costs.

(vi) Parties to act on authenticated copy of this order.

Judge.